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NO. 88-193

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH SCIABMRA d/b/a
PERIODICAL MARKETING
AND CONSULTING COMPANY
Petitioner

VERSUS

ARA SERVICES, INC.
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

JAMES A. BABST
of
CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-2300
Telephone: (504) 585-7000
Attorneys for Respondent,
ARA Services, Inc.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

LIST OF PARTIES, INCLUDING AFFILIATED CORPORATIONS

The parties to these proceedings are correctly listed by petitioner. ARA Services, Inc., respondent, pursuant to Rule 28.1, notes that its parent company is The ARA Group, Inc. The ARA Group, Inc. has no subsidiaries or affiliates that are not wholly owned except ARA/AS (a Norwegian corporation), Major Foods Limited (a Canadian corporation), and VS Services, Ltd. (a Canadian corporation).

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STATEMENT OF THE CASE

Respondent, ARA Services, Inc. ("ARA"), recommends to the Court the Fifth Circuit's summary of the pertinent facts and prior proceedings, reprinted at page A-2 through A-6 of the appendix to Sciambra's Petition, as far more faithful to the actual facts of this case and the course of the proceedings below than Sciambra's statement of the case. Except to note that the only court that has ever considered the factual merits of this case found that ARA did not violate the antitrust laws, ARA will limit its comments here to those aspects of Sciambra's statement that deserve it.

Sciambra's characterization of himself as a book and magazine wholesaler and a competitor of ARA's in the Greater New Orleans geographical market is certainly misleading. Sciambra was in fact a sub-distributor, or cash route operator, and obtained all of his relevant supply from ARA. His initial accounts came from ARA — those that ARA deemed uneconomical or inconvenient to serve with its own employees. The cash route agreement between them called upon Scaimbra to disclose his customer list to ARA and to update the list from time to time. ARA local management on several occasions attempted to smooth over trouble that had arisen between Sciambra and certain of his accounts. Those are not the arrangements or actions of competitors in any sensible use of the term.

The pre-termination relationship between Sciambra and ARA must be understood, if it is to be understood properly, in light of the fact that it was ARA, not Sciambra, that had the continuing and valuable relationships with national distributors and publishers, the ultimate source of the books and magazines that they both sold. And since it was ARA that was responsible to the national distributors and publishers for satisfactory service to New Orleans retailers, ARA had an interest in knowing who Sciambra's customers were and in assisting him in providing service to them, wherever such assistance became necessary. If Sciambra competed with anybody, it was with Metro News.

It is also misleading for Sciambra to state that ARA "agreed" with Graham, as part of the sale of its New Orleans magazine and book distribution assets to Graham, "that ARA would terminate Sciambra's source of supply prior to the sale." The simple economic facts were that ARA had lost several major accounts to Metro News in the months before the sale negotiations took place and that its

prospects were sufficiently dim that management had decided to close the facilities from which it might have continued to supply Sciambra with merchandise. It inquired of Graham, in light of those simple facts, whether Graham would be interested in taking on Sciambra as a cash route operator and had as a response that Graham had no corporate experience or history with cash route operators and preferred, for security reasons, to continue operating exclusively through its own employees. Since the cash route agreement between ARA and Sciambra provided on its face for termination without cause on thirty days' notice, it remained only for ARA to send the notice. Given that the anticipated closing on the assets sale was less than thirty days away, however, ARA took it upon itself to arrange to have Graham supply Sciambra with merchandise for that portion of the termination-notice period that remained unexpired after the physical closing. As it turned out, Graham News serviced Sciambra, on terms completely satisfactory to him, for approximately two weeks.

It is, therefore, not a fair comment that ARA terminated Sciambra as an accommodation to Graham or otherwise, or that it was paid for doing so. The choice was solely Graham's, given that it was unavoidable, after ARA's determination to cease operating in New Orleans, that ARA would stop dealing with Sciambra. Graham hardly needed ARA's concurrence to chose to supply or not supply Sciambra. ARA merely sent Sciambra a termination notice in keeping with the cash route agreement between them and did so as soon as possible after its commitment to sell its assets to Graham became firm. There is absolutely nothing sinister or illegal in that.

Paragraph 2.1(c) of the ARA/Graham sales agreement, specifically noting the inclusion of ARA's sales to Sciambra in the aggregate net sales figure that was to provide the basis on which the dollar sales price was to be

determined, at 65%, does *not* establish "that ARA received $255,000 for Sciambra's business." Other provisions were to the effect that net sales by ARA to those of its former customers that had been won over to Metro/Graham during the prior year were *not* to be included in the aggregate net sales base and so not to be reflected in the sale price. Although there was probably little room for disagreement on the point anyway, the parties decided to play it safe and specify clearly that ARA's sales to Sciambra were not in that category and, therefore, not to be deleted, despite Graham's announcement of its intention not to continue to supply him.

And it is emphatically not the case that an arm's-length valuation of ARA's assets at 65% of ARA's net annual sales to its customers, given its capital and expense structure and its way of doing business, fixes or even tends to fix the value of Sciambra's or any customer's business in reselling the merchandise. ARA sold its operating assets to Graham, and the parties to the sales agreement valued those assets in accordance with a formula that depended on net annual sales. It did not sell Sciambra's business. And neither the dollar amount it received from Graham for its assets nor the formula employed in arriving at that dollar amount would tend to show what Sciambra's own business, his own capacity to derive net profits from his operations, was worth.

All discussion of the going concern value or good will that may have inhered in Sciambra's business is beside the point, however, given that loss of going concern value or good will is precisely what the preliminary injunction entered against Graham prevented. Sciambra's own testimony, corroborated fully by that of a Graham principal, was to the clear effect that his customers, merchandise, terms of sale, expense structure, prices, and opportunity to make profits under the injunction were identical

to those that he had before ARA closed its doors. The only thing that did change was his sales volume, and that went up.

Plaintiff himself has never estimated his loss of net profits during the 70-day hiatus in his operations at more than $14,000 — and that estimate is far to high. His settlement with Graham, as Sciambra has admitted at page 5 of his Petition to the Court, "more than offsets lost profits for the days involved."

ARA was not a party to the settlement between Graham and Sciambra. It was neither consulted during the course of the negotiations nor notified that they were going on. One may reasonably infer that the settling parties ignored ARA because ARA had won on the preliminary injunction and because it was wholly implausible that it might be found later to have monopolized or conspired to monopolize a market that it had abandoned. Despite all that, the settlement has natural and legal consequences for ARA. The principal one flows from the simple fact that Graham paid Sciambra more than three times his maximum injury. It is only on account of Sciambra's stubborn refusal to acknowedge that fact, and its necessary implication, that this Petition is before the Court. The necessary implication is, of course, that the settlement pays the claim in full and ends the case.

REASONS FOR DENYING THE WRIT

I. Can a antitrust plaintiff's settlement with other defendants be considered in any way in determining the non-settling defendant's liability, prior to trebling?

What Sciambra appears to be driving at in his discussion of this first question is that the Fifth Circuit

erred in looking to the sale of his business to Graham, part and parcel of a settlement, before determing the extent of ARA's liability or Sciambra's damages, in violation of the strictures of Rule 408 of the Federal Rules of Evidence. The suppressed premise of the argument is that plaintiff became entitled to recover treble the value of his business when it was, as he alleges, sold or destroyed by the defendants in April 1984. Sciambra's conclusion is that it violates the rule against using settlements to determine liability or quantum for the court to have relied on evidence that plaintiff settled his case and sold his business in September 1984 in determining the amount of his continuing injury.

The basic flaw in the argument is that it misapprehends the Fifth Circuit's reasoning. The court wrote:

> Sciambra was not forced out of business by ARA and Graham. *The court had granted Sciambra a preliminary injunction which enabled him to continue receiving supplies; prevailing on the merits would have assured his future supplies as well.* Rather, Sciambra agreed to settle with Graham and, as part of the settlement, he agreed to sell his business and convenanted not to compete with Graham. It appears, therefore, that Sciambra's voluntary sale caused the loss of his ongoing business, not the antitrust violations.

Quoted in the appendix to Sciambra's Petition at page A-11 (emphasis added). The point is that the preliminary injunction, not the settlement, stopped Sciambra's accumulating injury after 70 days. Sciambra's cessation of operations after that, pursuant to the Graham settlement and the covenant not to compete with Graham, was voluntary, not traceable to ARA or anything that it did or didn't do. Having had his going concern value and good will

restored to him by the preliminary injunction, Sciambra cannot complain that it was lost a second time through voluntary action on his part. Evidence of the settlement and the covenant not to compete were offered not to show that they ended Sciambra's continuing injury but rather only to demonstrate that the injury—ending effects of Judge Feldman's preliminary injunction had, by agreement of the parties to the settlement, become permanent. Rule 408 doesn't come into question.

It was not, moreover, the quality of the Graham/Sciambra settlement agreement *qua* settlement that led the Fifth Circuit to use evidence of it the way it did. Plaintiff must prove his own damages, even where the court has entered a default.[1] *U.S. ex rel M-CO Construction, Inc. v. Shipco General, Inc.*, 814 F.2d 1011, 1014 (5th Cir. 1987). Sciambra's proof in the trial court was not that his business had been destroyed but rather that he had experienced an involuntary operational hiatus of 70 days between April and July of 1984 and a voluntary cessation of operations after September. That proof alone is sufficient to dictate the result ARA sought and obtained in the Fifth

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[1] ARA decided not to cross-petition the Court on the appropriatenes of entry of a discovery default in this case, not because it concedes the point, but rather because it is convinced that the Fifth Circuit's handling of the damages issue is correct and that the practical result on remand, as Sciambra has already predicted, will be that he will recover nothing. Even so, it cannot let pass without comment Sciambra's castigation of ARA as having "engaged throughout these proceedings in such outrageous conduct as to warrant imposition of the extreme sanction of default judgment." Petition at 9. The cold record reflects nothing of the sort, but rather only an insistence on ARA's part that the injunction and settlement, taken together, undercut Sciambra's continued prosecution of its groundless claim against ARA in precisely the manner that a unanimous panel of the Fifth Circuit has now declared it undercut. There were *no* discovery battles in the case until *after* ARA filed its motion suggesting that the injunction and settlement, taken together, mooted the claim. The outrageous conduct was by the plaintiff, in continuing to prosecute it.

Circuit, and it matters not that Sciambra's voluntary cessation of operations in September 1984 was pursuant to a settlement agreement.

ARA does not understand Sciambra to complain that Rule 408 prohibited consideration by the courts below of the amount of the settlement in applying this Court's offset rule for antitrust cases, as explained in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). ARA doesn't either.

II. Does an antitrust plaintiff forfeit his claim to damages already sustained, by (1) obtaining a preliminary injunction, and (2) entering into a settlement agreement with other defendants, with the result that the non-settling defendant profits from the antitrust violation?

Where the preliminary injunction works, in that it puts a stop to the plaintiff's accumulating injury, and plaintiff's settlement receipts are greater than three times his past injury, the answer to the question Sciambra poses is unequivocally and bluntly yes. Preliminary injunctions are granted precisely to put a stop to ongoing injury. *See Canal Authority of the State of Florida v. Callaway,* 489 F.2d 567 (5th Cir. 1974). And where one does the job it was intended to do, as the one entered in this case did, it is nonsensical for a party to suggest that the court should ignore the fact and award damages as if the injunction had neither been asked for nor granted.

The Third Circuit's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 377 F.2d 776, 782 (3d Cir. 1967), *aff'd in part, rev'd in part on other grounds,* 392 U.S. 481, *reh'g denied,* 393 U.S. 901 (1968), is not to the contrary, as ARA has explained in detail in the prior proceedings in this case. At issue in *Hanover Shoe* was the validity of defendant's assertion of a passing-on defense,

that is, a defense that plaintiff lessee of defendant's shoe machinery could not recover monopolistic overcharges in machinery rent because plaintiff had recovered those overcharges in the higher prices it charged its customers for shoes it made with the machines. This Court rejected the passing-on defense, but without reliance on the proposition for which Sciambra cites the Third Circuit opinion. *See* 392 U.S. at 487-94. There is nothing in any of the *Hanover Shoe* decisions, moreover, including the lengthy finding on damages reported in 245 F. Supp. 258 (M.D. Pa. 1965), to indicate that the courts viewed plaintiff's injury as accruing in perpetuity, beyond the time that defendant undertook compliance with an antitrust injunction that prohibited maintenance of the lease-only policy for its shoe machinery that facilitated its extraction of monopolistic overcharges. See *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Read properly, the Third Circuit's comment in *Hanover Shoe* was only to the effect that *injury, once incurred*, is antitrust compensable without regard to the victim's success or failure in attempting to cover. It is not to the effect that post-violation developments are immaterial to the accrual and assessment of injury, or that violations or their effects are eternal. Appropriate and effective injunctions, such as that entered in *Hanover Shoe* itself, are obviously of utility in ending violations and injury. That they do so is clear from even a cursory reading of the decisions in *Los Angeles Memorial Coliseum Commission v. National Football League, 791 F.2d 1356 (9th Cir. 1986), cert. denied sub nom Los Angeles Raiders v. National Football League,* ____ U.S. ____, 108 S. Ct. 92, 98 L.Ed. 2d 53, 56 U.S.L.W. 3243 (1987); *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981); *City of Mishawaka, Ind. v. American Electric Power Co.*, 616 F.2d 976 (7th Cir. 1980); and *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

The *Zenith* offset rule is unchallenged, even by Sciambra, and clearly to the effect that "a plaintiff who has recovered any item of damage from one co-conspirator may not again recover the same item from another co-conspirator; the law, that is, does not permit a plaintiff to recover double payment." 401 U.S. at 348. This Court made no allowance in *Zenith* for an exception to that rule where application of it would allow a non-settling defendant to keep all or part of his ill-gotten profit. Quite the contrary. The Court extended the rule in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636 (1981), wherein it held that antitrust defendants had no right of contribution among themselves, rejecting the argument that a rule permitting contribution would promote "a greater likelihood that most or all wrongdoers will be held liable and thus share the consequences of the wrongdoing." If, as *Texas Industries* teaches, antitrust defendants are to be left where they are found, 451 U.S. at 635, antitrust plaintiffs must suffer the same fate. To allow a plaintiff to recover three times his injury from one defendant, whether by way of settlement or judgment, and to retain his claim against a remaining defendant is to open the door to double recovery, which *Zenith* forbids. Policies about disgorgement notwithstanding, the statute is written in terms solely of the right of one injured in his business or property by a violation of the antitrust laws to recover for his injury, and it sets the recovery at threefold the injury he sustains, not sixfold, or ninefold, or twelvefold. 15 U.S.C. § 15.

CONCLUSION

This case presents no unusual issues. The law that governs the dispute between Sciambra and ARA does not go beyond the ordinary in antitrust analysis. The Fifth Circuit's application of it to the facts was straightforward. The district court made an obvious error when it awarded

Sciambra what it thought was necessary to compensate him for the utter destruction of a business that was not, on any reading of the record, destroyed. The Fifth Circuit's reversal and remand on damages is sound, as are its instructions to the district court to limit damages on remand to the net profits Sciambra lost during the hiatus in his operations. There are no issues in the petition of sufficient significance to suggest seriously that a writ of certiorari issue.

Respectfully submitted,

JAMES A. BABST
of
CHAFFE, McCALL, PHILLIPS,
TOLAR & SARPY
2300 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163-2300
Telephone: (504) 585-7000
Attorneys for ARA Services, Inc.